

BEFORE THE
SURFACE TRANSPORTATION BOARD
WASHINGTON, DC 20423

STB FINANCE DOCKET NO. 35087

CANADIAN NATIONAL RAILWAY COMPANY AND GRAND TRUNK CORPORATION
-- CONTROL --
EJ&E WEST COMPANY

**TRAC's RESPONSE TO CN'S JUNE 25, 2010 COMMENTS
PURSUANT TO BOARD DECISION NO. 23**

On June 25, 2010 Canadian National Railway (CN) filed an unauthorized response to TRAC's Comments pursuant to the Board's Decision 23 in the above-referenced docket. Although the TRAC Coalition -- that is made up of local elected leaders from counties and municipalities impacted by CN's acquisition of the EJ&E rail line -- understands that the Board closed the comment period on Decision 23 prior to CN's response, we respectfully submit these brief comments in response to CN's June 25 filing as it would do the Board (and residents of the region) a disservice to allow some of the most egregious misstatements made by CN to stand uncorrected in the record of these proceedings.

CN attempts to make a general case in its June 25 filing that the consultant's (HDR's) Final Report* "generally confirmed that CN has been complying with its obligations under the Approval Decision." We document for the record, however, that the entire audit that led to Decision 23 and many of the examples raised by CN as good faith efforts to comply with the Board's mandate were *a*

* TRAC emphasizes its ongoing contention that HDR has a clear conflict of interest in auditing compliance on this transaction.

direct result of the ongoing monitoring and Board communications instigated by TRAC to protect the region's interest and the safety of its citizens. In other words, absent TRAC's ongoing efforts to monitor the performance and veracity of CN's monthly filings via TRAC's creation of a complaint reporting mechanism for area residents on the www.fightrailcongestion.com website, it is unclear that anything meaningful would have occurred in this initial year of oversight that would have enabled the valid concerns of impacted communities to be known and addressed. There can be no better example of this reality than the fact that CN ignored the clearly worded Board instruction to report crossing blockages. Absent residents' reports into TRAC and the Board via the TRAC website complaint mechanism, no one would have been the wiser as to the scope of the blocked crossings problem, and it is highly unlikely any audit (no matter how flawed) would have been undertaken.

RTU Tutorial:

Thanks to CN's June 25 tutorial on RTU technology operations, impacted communities now have a better idea as to how that technology functions. That is a positive development that we welcome, however, TRAC would like to point out the following:

- CN states that the 72 RTU units that were on the inner circle of CN lines became non-functioning in early 2008 when analog service was allowed to be terminated by cellular providers (pages 4 & 5.) That may be the case, but regardless of how the signal was transmitted (digital or analog) CN would have had some idea of the functional capacity of these units after using them for six years, even though they are not generally used to systemically collect blocked crossing data. When faced with the need to systemically collect such data by the Board's mandate, it would appear sensible for CN to have inventoried all means at its disposal in looking for solutions for what it clearly believes to be an unprecedented burden.

That CN -- a railroad that prides itself on squeezing ever-increasing efficiencies from its operating practices -- would look first to expensive and human resource-intensive on-site monitoring by its own personnel, as opposed to looking at what existing technology could be modified for systemic reporting does not seem plausible.

- CN attempts to clarify the data provided by the RTU units and complains that TRAC fails to look at the blockage data correctly (pages 11 through 13.) In correcting the record, CN uses a footnote (footnote 20) to discuss its initial double-counting of blocked crossings between July 2007 and March 2008, and the fact that it has now adjusted the original numbers it had so widely distributed in the media in support of its claim that the incidents of blocked crossings have vastly improved under its operations on the EJ&E. Unfortunately, CN doesn't actually provide the revised data in its June 25 filing; nor could TRAC find the revised data on the Board's website in either the Audit section or in CN's May, June or July monthly operations report; nor in any corrective press releases issued by CN. Given the reality that CN wants TRAC to be fully accurate about the data and how it analyzes such data, is it too much to expect CN to provide the revised data that would allow TRAC and the public to do so?
- CN claims that it *"does not anticipate that there will be any specific locations where blockages will increase exponentially"* due to its infrastructure upgrade plans (pages 13 and 14.) Again, we have a CN claim with no documentation. There are a finite number of public crossings on the EJ&E. If CN can make a claim contending everything will be fine once the line's infrastructure is upgraded, it must be able to document in a format comprehensible to the public the blockage patterns at each crossing that are then explicitly tied to specific upgrades that will remedy the situation at each crossing. Yet, CN fails to do so.

CN's Attempt to Refute TRAC about CN's Pattern of Deception:

CN closes its June 25 filing by attempting to refute TRAC's characterization that CN's reporting has been misleading to the Board and the public (pages 15 through 17.) CN uses three examples of its good faith efforts to comply with the Board's mandates and report accurately. For purposes of brevity, TRAC will note that the two accidents that CN describes in its June 25 filing (page 16) were only brought to the attention of the Board *after* TRAC raised them in its communications to the Board.

Additionally, the Board should note that CN's verbiage in this June 25 filing about reporting a brush fire incident underscores a fundamental problem with CN's attitude towards oversight on this transaction when CN states (at page 16) that "the incident was not required to be reported to the FRA because no injuries were sustained and damage done to rail property." In the decision approving the transaction, the Board had positioned the monthly operations reports and quarterly environmental reports from CN as "mitigation" on behalf of impacted communities. If "mitigation" was at the center of the Board-mandated reporting requirement, then CN's argument that it had no duty to report this incident seems to be not only inaccurate, but purposefully unforthcoming.

To help the Board understand more fully CN's efforts to mislead the Board even now and its continuing cavalier attitude towards public safety issues, TRAC will respond fully to CN's claims regarding VM#9.

In VM9, the Board ordered CN to *"provide and maintain permanent signs prominently displaying both a toll-free telephone number and a unique grade-crossing identification number in compliance with Federal Highway Regulations... The toll-free number shall enable drivers to report accidents, malfunctioning warning devices, stalled vehicles, or other dangerous conditions."*

CN claimed that such signs were in place as of July 10, 2009 and that it was a matter of TRAC not liking the size and placement of the signs, rather than its compliance failure that is at issue. However, CN's assertion that it had signs in place when it originally claimed it did is not true, and TRAC's assertion to the opposite can be supported by the firsthand knowledge of Board Chairman Elliott and Office of Compliance Director Wallen as a result of their visit to Barrington on December 21, 2009. It was pointed out to both Board representatives at the time that there were no signs in place – a reality they could both see for themselves. Yet despite this firsthand observation by the Board Chairman and a senior Board staff member, CN continues to argue that they were, in fact, in place!

CN then goes on to tell the Board in its June 25 filing that new signs have been installed that meet new Federal Highway Regulation standards revised in December 2009. Even now, this statement is inaccurate and an example of CN playing fast and loose with what it tells the Board. CN claims that 'the new signs CN has installed comply with the new edition of MUTCD, as required by VM 9.' Yet, Section 8B.18 on pages 762 and 763 of the December 2009 MUTCD states verbatim:

Section 8B.18 Emergency Notification Sign (I-13)

Guidance:

01 Emergency Notification (I-13) signs (see Figure 8B-5) should be installed at all highway-rail grade crossings, and at all highway-LRT grade crossings on semi-exclusive alignments, to provide information to road users so that they can notify the railroad company or LRT agency about emergencies or malfunctioning traffic control devices.

Standard:

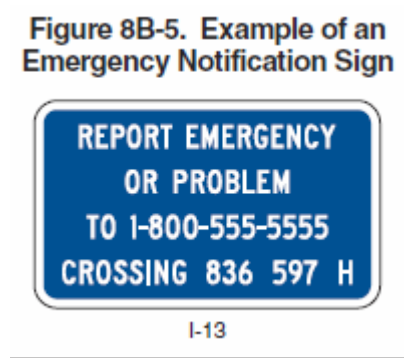
02 When Emergency Notification signs are used at a highway-rail grade crossing, they shall, at a minimum, include the USDOT grade crossing inventory number and the emergency contact telephone number.

03 When Emergency Notification signs are used at a highway-LRT grade crossing, they shall, at a minimum, include a unique crossing identifier and the emergency contact telephone number.

04 Emergency Notification Signs shall have a white legend and border on a blue background.

05 The Emergency Notification signs shall be positioned so as to not obstruct any traffic control devices or limit the view of rail traffic approaching the grade crossing. I-13

Figure 8B-5. Example of an Emergency Notification Sign:



Guidance:

06 Emergency Notification signs should be retroreflective.

07 Emergency Notification signs should be oriented so as to face highway vehicles stopped on or at the grade crossing or on the traveled way near the grade crossing.

08 At station crossings, Emergency Notification signs or information should be posted in a conspicuous location.

09 Emergency Notification signs mounted on Crossbuck Assemblies or signal masts should only be large enough to provide the necessary contact information. Use of larger signs that might obstruct the view of rail traffic or other highway vehicles should be avoided.

The above-referenced sign example (Figure 8B-5) serves as reference to a chart in the MUTCD Handbook (Table 8B-1. Grade Crossing Sign and Plaque Minimum Sizes on page 752) that provides sizes for various types of signage tied to the section of the Handbook referenced. For the emergency notification signs designated 8B.05, the sign sizes designated range from 30 by 30 inches to 48 by 48 inches, depending upon how many lanes of traffic are at the grade crossing. A note to the chart designating sign sizes reads: “*Larger signs may be used when appropriate.*” The fact that CN chose to place the signs on Crossbuck Assemblies to justify their inadequate size is simply CN’s attempt to game the board’s clear directions to install prominent signs to assure the safety of citizens who must cross the many grade crossings along the EJ&E. The Board can clearly see from photos taken on July 15 & 19, 2010 that CN’s new signs fail to meet the broader guidance in current MUTCD standards:

SIGN AT BARRINGTON HWY 14:



(This is the grade crossing on the EJ&E with the second highest 2015 projected ADT of 33,949.)

The small blue sign CN claims is in compliance with the Board's VM#9 mandate is located above the lights on the crossing gate mechanism on the far side of the tracks from the traffic facing it.

It is:

1. Far smaller than the MUTCD Handbook requires;
2. Not legible absent standing dangerously close to the rail tracks;
3. Oriented across the track from the traffic facing it, thus requiring a motorist to crawl under a train to view the sign if the intersection were to be blocked by a train; and,
4. Certainly fails to meet any rational person's definition of a "prominence" test.

Lest the Board believe that TRAC might be "cherry-picking" a crossing with a signage problem, TRAC has provided additional photographic documentation (dated July 15 & July 19, 2010) demonstrating these same non-compliance issues at five other crossings along the EJ&E. TRAC apologizes to the Board for the fact that it is difficult to find the indicated signs in these photographs, but this reality mirrors the difficulty drivers in the region are having with these signs.

SIGN AT CUBA ROAD IN LAKE ZURICH:



(The new CN sign is in the same location as the sign at Barrington Hwy. 14 on the far side of the tracks and not at all visible. As a comparison, note the more prominent (and now obsolete) EJ&E sign that had marked the crossing prior to the acquisition.)

SIGN AT LAKE ZURICH ROAD IN BARRINGTON:



SIGN AT MAIN STREET IN BARRINGTON:



SIGN AT ELA ROAD IN CUBA TOWNSHIP:



Conclusion:

With every new filing, CN creates a record before the Board that demonstrates it is committed to frustrating the Board's oversight intentions on this transaction vis-a-vis insuring public safety. The time is long past due for the Board to take firm action to get the situation under control. Transferring oversight of this transaction to the General Accountability Office (GAO) or a truly impartial third-party consultant would help to confirm for the region that insuring public safety is of critical importance to the Board. TRAC reiterates its request to the Board to transfer oversight, as such a move will do much to assure the region that it can begin to have confidence that its interests are being proactively represented by federal authorities.

Respectfully Submitted,



Karen Darch
President, Village of Barrington
& TRAC Co-Chair
Village of Barrington
200 South Hough Street
Barrington, IL 60610
847/304-3445



Tom Weisner
Mayor, City of Aurora
& TRAC Co-Chair
City of Aurora
City Hall
44 East Downer Place
Aurora, IL 60507